

82-1311

Office-Supreme Court, U.S.
FILED

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ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1982

JEWELL PRODUCTIONS, INC., aka EROS; JAMES L. SCOTT,
Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF LOS ANGELES.**

BURTON C. JACOBSON,
424 South Beverly Drive,
Beverly Hills, Calif. 90212,
(213) 553-8533,

Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

A. Whether California Penal Code §311.5 as construed and applied herein, can be used to authorize the conviction of the petitioners upon the grounds that they mailed out advertisements for allegedly obscene material, without regard to whether or not the material actually sent was obscene, and without regard to the fact that the advertisements themselves were not obscene. Petitioners contend that such application deprives them of their liberty and property without due process of law contrary to the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution.

B. Whether it was proper to allow the prosecution to offer into evidence, for consideration by the jury, portions only of the advertisements without requiring that the entire advertising brochure be considered as a whole.

Petitioners contend that that was improper, based upon California Penal Code §311(a) which defines "obscene matter" as

" 'matter' *taken as a whole*, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest *i.e.* a shameful or morbid interest in nudity, sex, or excretion; and is matter *which taken as a whole* goes substantially beyond customary limits of candor in description or representation of such matters; and is matter *which taken as a whole* is utterly without redeeming social importance." [Emphasis added]

Petitioners further contend that that too was improper under the First Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution.

C. Whether it was proper for the trial court to refuse to permit petitioners to place into evidence the actual material advertised in the brochures so that the jury might consider the non-obscene nature of the advertised materials in reaching their decision on whether or not California Penal Code §311.5 was violated by the acts of the petitioners herein. Petitioners allege not having been permitted to do so, violated their constitutional rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

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PEOPLE OF THE STATE OF CALIFORNIA,
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**PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF LOS ANGELES.**

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Appellate Department of the Superior Court of the State of California, County of Los Angeles, in the above-entitled case.

1. Opinion Below.

Petitioners were convicted in the Municipal Court of California, Los Angeles Judicial District, County of Los Angeles, the Honorable James S. Yip, Judge Presiding.

The jury verdict of "guilty" was rendered on January 20, 1982. No written opinion was rendered by the trial judge.

Petitioners appealed their conviction to the Appellate Department of the Superior Court of the State of California,

County of Los Angeles. On November 22, 1982, the Appellate Department, State of California, filed its Opinion and Judgment, which is attached hereto as Appendix "A".

Petitioners, in a timely fashion, filed a Petition for Rehearing and/or Certification on November 30, 1982. A copy of that Petition is attached hereto as Appendix "B".

On or about December 1, 1982, respondent, PEOPLE OF THE STATE OF CALIFORNIA, filed a Request for Publication of Unpublished Opinion, a copy of which is attached as Appendix "C".

On December 9, 1982, the Appellate Department of the Superior Court for the State of California, County of Los Angeles, filed its Order denying a Rehearing and Denying Certification and Publication, a copy of which is attached hereto as Appendix "D".

2. Jurisdiction.

The judgment and conviction in the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California was entered against petitioners on January 20, 1982. A timely appeal was filed to the Appellate Department of the Superior Court, State of California, County of Los Angeles, which Appellate Department filed its Opinion and Judgment on November 22, 1982.

On November 30, 1982, a timely Petition for Rehearing and/or Certification was filed by petitioners and the Order Denying that petition was filed by the Appellate Department of the Superior Court, State of California, County of Los Angeles, on December 9, 1982.

The judgment of the Appellate Department of the Superior Court became final upon denial of the Petition for Rehearing. [Rule 107(b)(1) of the California Rules of Court]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1257(3).

3. Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth and Fourteenth Amendments of the Constitution of the United States and the provisions of California Penal Code §§311.(a) and 311.5 are involved.

4. Statement of the Case.

Petitioners were charged in one count of a misdemeanor complaint in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California with a violation of Section 311.5 of the California Penal Code, charging them with wilfully and unlawfully writing, creating and soliciting the publication and distribution of advertising and other promotional material, and promoting the sale, distribution and exhibition of matter represented and held out to be obscene. A copy of said complaint is attached hereto as Appendix E.

It was never contended by the PEOPLE that the advertising brochure itself, or the product sent pursuant thereto, was obscene. It was the PEOPLE's contention that certain portions only of the advertising brochure violated California Penal Code §311.5.

At the trial, the judge permitted the PEOPLE to offer into evidence and argue to the jury portions only of the advertising brochure. The trial court did not require the jury to consider the entire advertising brochure as a whole, and instructed the jury that they could consider those portions that the prosecution referred to, separate and apart from the entire brochure.

The trial judge did not require the prosecution to prove what materials were sent pursuant to the advertising brochure, nor whether or not such materials actually sent were obscene. Also, the trial court refused to permit petitioners to offer into evidence the materials actually sent and to

prove that those materials were not obscene. Petitioners contend that had the court allowed them the introduction of that evidence, it would have been conclusive proof to the jury that the materials sent were not obscene and that therefore the meaning of those portions of the advertising in question did not in any way, advertise or promote the sale of obscene material.

Petitioners contend that their constitutional rights guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution were thus violated.

Petitioners presented their claims of the violations of their Constitutional rights at every instance of the proceedings brought against them. They first raised the question of unconstitutionality in a demurrer to the misdemeanor complaint. It was filed on July 31, 1980, a copy of which is attached hereto as Appendix "F". That demurrer was overruled by the Municipal Court. The Constitutionality questions were raised by petitioners continuously throughout the trial in the Municipal Court by objections made to the trial judge's rulings which allowed the prosecution to present its case as to certain portions of the advertising brochure only, without regard to the fact that the advertisements and the materials sent pursuant thereto, were not obscene. Also, the petitioners offered to prove what materials were actually sent pursuant to the brochure and that they were not obscene. Such offers were rejected by the trial court and petitioners were not permitted to make such argument to the jury. The objections and arguments were lengthy and appear in the Reporter's Transcript of Proceedings commencing at page 4 through page 58, and again at 138 through 139.

The Constitutional questions were further raised by the petitioners in their appeal to the Appellate Department of the Superior Court of the State of California, County of Los

Angeles, and again in their Petition for Re-Hearing and/or Certification.

REASONS RELIED UPON FOR GRANTING WRIT.

It is petitioners' contention that California Penal Code §311.5 as applied in the instant case is unconstitutional. Petitioners further contend that it was error to allow the advertising material and brochure to be taken part by part and not be considered as a whole.

Petitioners also contend that it was error for the court not to allow petitioners to place into evidence the materials actually sent pursuant to the advertising in order to prove to the jury that the materials sent were not obscene, and that, therefore, the advertisements were not advertising obscene materials.

California Penal Code §311.5 came into being in its present form in 1969. Petitioners are unaware of any case which has interpreted §311.5 of the California Penal Code since 1969.

Petitioners' contention that the entire brochure should have been treated as a whole is borne out by California Penal Code §311(a) which requires matter to be taken as a whole.

California Penal Code §311(a), *supra*;

Bloom v. Municipal Court, 16 Cal. 3d 71;

People v. Enskat, 33 Cal. App. 3d 900;

Roth v. U.S., 354 U.S. 476;

Alberts v. State of California, 355 U.S. 852;

Miller v. California, 413 U.S. 15;

Hamling v. U.S., 418 U.S. 87.

The trial court, in not allowing petitioners' evidence of the actual materials sent, nor permitting petitioners from proving and arguing that what was actually sent was not obscene, effectively tied petitioners' hands in such a fashion as to permit the prosecution to say that there are taboo subject matters which cannot be discussed and which are not protected by the United States Constitution. That po-

sition is contrary to the First and Fourteenth Amendments of the United States Constitution which protects all ideas unless they are expressed in an "obscene" manner.

Roth v. U.S., *supra*;

Alberts v. State of California, *supra*;

Miller v. California, *supra*;

People v. Enskat, *supra*.

The only cases petitioners can find that have interpreted California Penal Code §311.5 occurred prior to its amendment in 1969. These cases are:

Kirby v. Municipal Court, 237 Cal. App. 2d 335 (1965);

People v. Tierney, 253 Cal. App. 2d 1 (1967).

In the *Kirby* case, the court said at page 343:

"The language in Section 311 Penal Code which was involved in the *Alberts* case means the same as today's §311.5 although it is not quite as specific as §311.5."

Kirby further stated at page 348:

"Though we have discussed cases arising under the postal laws, which are considerably broader, less specific than our state statute, we do not wish to be understood as passing upon the validity of a statute which seeks to punish publications that contain a mere 'leer' promising obscene pictures or writings, or upon any issues not immediately pertinent to California Section 311.5." [Emphasis added]

Petitioners believe that the *Tierney* case, *supra*, is inapplicable to the instant case. In the *Tierney* case it was proved that the specific purpose of the defendants was to make persons believe that the advertised materials were really obscene; *i.e.* there was evidence in *Tierney* that the defendants in fact intended to advertise and promote the sale of obscene materials. In the instant case, petitioners have con-

tended throughout that that was not their intention and that neither the advertising material nor the material sent pursuant thereto were obscene and that the advertising involved no obscenity.

In the *Kirby* case, *supra*, it was stated at page 348: "Clearly, advertising of matter which is found or conceded to be obscene is not within the protective area of free speech or press".

Since petitioners contended throughout that the matter sent was not obscene, their position that California Penal Code 311.5 was not constitutionally applied is borne out.

The position of the Appellate Department, not requiring that the matter be taken as whole as set forth in California Penal Code §311(a), for a violation of Penal Code §311.5 is contrary to the First and Fourteenth Amendments to the United States Constitution and contrary to the established decisions of this court.

Roth v. U.S., *supra*;

Alberts v. California, *supra*;

Miller v. California, *supra*;

Hamling v. U.S., *supra*.

Apparently the prosecution agrees that this was a unique departure from the law by the Appellate Department as is evidenced by their Request for Publication of Unpublished Opinion wherein they state at line 23 page 1:

"This request is predicated on two grounds. First, no published opinion has ever addressed the issue of whether or not the definition of 'obscene matters' in Penal Code 311(a) pertains to advertisements prosecuted pursuant to California Penal Code Section 311.5. Additionally, this particular legal issue is one of continuing public interest as law enforcement agencies

investigate numerous similar type cases *and the rule of law of this case has not previously been established.*" [Emphasis added]

Conclusion.

It is respectfully submitted that the conviction of petitioners violates their constitutional rights of freedom of speech and press and due process, and the judgment of the Appellate Department of the Superior Court of the State of California, County of Los Angeles, should be reversed, rescinded and vacated.

Respectfully submitted,
BURTON C. JACOBSON,
Attorney for Petitioners.

APPENDIX A.

Opinion and Judgment.

Appellate Department of the Superior Court, State of California, County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Jewell Productions, Inc., aka: Eros & James L. Scott, Defendants and Appellants.

Superior Court No. CR A 19703. Municipal Court of the Los Angeles Judicial District, No. 31156391.

Filed: November 22, 1982.

Appeal by defendant from judgment of the Municipal Court, James S. Yip, Judge.

JUDGMENT AFFIRMED.

For Appellant: Burton C. Jacobson.

For Respondents: Ira Reiner, City Attorney; John D. O'Loughlin, Deputy City Attorney; Donna B. Weisz, Deputy City Attorney.

Defendants, Jewell Productions, Inc. and James Scott, appeal from their conviction, following a jury trial, of violating Penal Code Section 311.5 (advertising or promoting the sale or distribution of matter represented to be obscene). On appeal, defendants contend that the trial court erred in permitting the People to offer into evidence only portions of the advertising brochure prepared and mailed by defendants and on which the prosecution was based. Defendants also claim that it was error for the trial court to refuse to permit them to place into evidence the actual material advertised in the brochure.

Defendants were charged only with a violation of Penal Code Section 311.5 which provides:

"Every person who writes, creates, or solicits the publication or distribution of advertising or other pro-

motional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor."

They were not charged with the actual sale of obscene material as proscribed by Penal Code Section 311.2.¹ It is their position, however, that there can be no determination of

¹Penal Code Section 311.2 provides:

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

"(b) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others for commercial consideration, or who offers to distribute, distributes, or exhibits to others for commercial consideration, any obscene matter, knowing that such matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual intercourse, masturbation, sodomy, bestiality, or oral copulation is guilty of a felony and shall be punished by imprisonment in state prison for two, three, or four years, or by a fine not exceeding fifty thousand dollars (\$50,000), in the absence of a finding that the defendant would be incapable of paying such a fine, or by both such fine and imprisonment.

"(c) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

"(d) Except as otherwise provided in subdivision (c), the provisions of subdivision (a) or (b) with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter."

whether Section 311.5 has been violated without a consideration of the nature of the materials actually sold.

In *People v. Tierney* (1967) 253 Cal.App.2d, 1, the Court of Appeals reversed the trial court's dismissal of an indictment against the defendants for conspiracy to violate Section 311.5 based on their mailing of a brochure offering for sale films, still photographs, playing cards, and comic books, despite the fact that all of the materials advertised, according to the Court, "may properly be described as innocuous." *Id.* at 3. In so holding the Court found that:

"All of the respondents knew of the contents of their brochure, since all participated in its preparation or distribution, or both. It offers, or at the very least appears to offer, material of an obscene nature. Its preparation was carefully devised, and its calculated purpose was to lead the reader to believe that some perverted or sexual material would be supplied to those who placed their orders and sent in their money. But as we have said, the material supplied was innocuous."

Id. at 4-5.

The holding in *Tierney* is consistent with that in *People v. Kirby* (1965) 237 Cal.App.3d 335, decided two years earlier, in which the Court upheld the constitutionality of Section 311.5.² The *Kirby* court, after observing "that section 311.5 relates to one who writes or creates advertising or solicits publication of same or promotes sale or distribution of matter represented to be obscene", held that:

"imposing criminal sanctions upon advertising or representing or holding out of any writing as obscene, the telling where to get it, is intrinsically needed and

²Penal Code Section 311.5 prior to the 1969 amendment read as follows: "Every person who writes or creates advertising or solicits anyone to publish such advertising or otherwise promote the sale or distribution of matter represented or held out by him to be obscene, is guilty of a misdemeanor."

designed for protection of those who have depraved tastes and desires, as much so as is the display of same at the moment of sale, and that section 311.5 is constitutional when applied to one who acts without actual knowledge of the contents or complexion of the written matter that he promotes.⁵

Section 311.5 was enacted in 1961 after American Law Institute had completed its 1957 draft of Model Penal Code. Our Supreme Court in *Zoitlin v. Arnebergh*, *supra*, 59 Cal.2d 901, 911 stated that the Legislature patterned its definition of obscenity upon one set forth in said Model Penal Code and it is fair to assume that section 311.5 was modeled upon section 207.10 of that Code, the purpose of which is explained in comments found on page 53 of Tentative Draft No. 6, *viz.*: "Subsection (6) adopts a suggestion from the New York Penal law punishing advertising or other promotion of material 'purporting to be' obscene. In other words, if the actor plays on prurient interest, holding out the promise of forbidden thrills, he may be convicted without proof that any particular material he meant to supply meets the tests of obscenity set forth in subsection (2). Such advertising may legitimately be forbidden as probably fraudulent, and also on the ground that a strong suggestion that a book or picture is obscene may well make it so in the mind of those who are persuaded to buy on this basis. It has been suggested that such huckstering is in fact worse than deliberate sale of genuine obscenity because: (1) the purchaser has frustration and a sense of being cheated in addition to his sense of guilt over desiring eroticism, and (2) it often constitutes a kind of defamation of serious works of learning or beauty." *Id.* at 350-351.

Since an individual may be convicted of violating Section 311.5 irrespective of the actual nature of the materials advertised, the trial court in the instant case did not err in refusing to permit defendants to place into evidence the materials advertised in the brochure on which defendants'

convictions were based. Since defendants were not charged with the sale of obscene materials, such evidence was not relevant and could not form the basis of a viable defense to the 311.5 charges.

Defendants next contend that the trial court should not have permitted the People to offer into evidence only portions of the advertising brochure. This contention is based on language contained in Penal Code Section 311, subdivision (a) which defines "obscene matter" as "matter *taken as a whole*, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, . . .; and is matter which *taken as a whole* goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which *taken as a whole* is utterly without redeeming social importance." [emphasis added]. Section 311.5, however, requires only that matter advertised or promoted "in any manner" be represented or held out to be obscene.³ It does not require that everything advertised or promoted be represented or held out to be obscene or that the advertisements in question be evaluated in the context of other advertised materials. To adopt defendants' interpretation would be to enable individuals to avoid prosecution under Section 311.5 merely by accompanying advertisements for purportedly obscene materials with advertisements for materials which are obviously not represented to be obscene. Further, the definition of "obscene matter" contained in Section 311, subdivision (a) clearly pertains to the materials themselves and not to the advertisements used to promote them. We find, therefore, that it was not improper for the trial court

³The material introduced into evidence in the instant case certainly satisfied this definition. The brochures advertised "Porno at Wholesale", "Filthy Porno Cartoon books", and "One Hundred Hardcore Glossies", among other things.

to permit the People to offer into evidence only portions of the brochure in question in that a finding that anyone of the advertisements amounted to the promotion of obscene materials would support a conviction under Section 311.5.

The judgment is affirmed.

/s/ Rothman
Judge

We concur.

/s/ Foster
Acting Presiding Judge
/s/ Jones
Judge

APPENDIX B.

Appellants' Petition for Rehearing and/or Certification.

Appellate Department of the Superior Court, State of California, County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Jewell Productions, Inc., aka: Eros & James L. Scott, Defendants and Appellants. Superior Court No. CR A 19703. Los Angeles Judicial District, No. 31156391.

Filed: November 30, 1982.

Pursuant to Rules 62, 63 and 107 of the California Rules of Court, Appellants hereby petition the Court for rehearing and/or certification.

The grounds for the within petition are that the appeal involves the constitutional guarantee of freedom of speech under the First Amendment to the United States Constitution. The interpretation of P.C. 311.5 concerning the issues raised in the instant appeal, have not previously been decided since that section's amendment in 1969. Because of the constitutional nature of the case, Appellants wish to have the issues raised in the appeal reheard and/or certified to a higher court.

Appellants contend that this court erred in its interpretation of P.C. 311.5; and in the application of *People v. Tierney* (1967, 253 Cal.App.2d 1, and *People v. Kirby* (1965), 237 Cal.App.2d 335 to the facts in the instant case. Additionally, Appellants contend that the court further erred in not applying the requirements of P.C. 311(a) concerning "*matter taken as a whole*" to P.C. 311.5.

Rehearing is necessary, or alternatively, certification is appropriate in order to safeguard the sensitive First Amend-

ment constitutional rights involved herein, and to settle extremely important issues of law related thereto.

Respectfully submitted.

/s/ Burton C. Jacobson
BURTON C. JACOBSON,
Attorney for Appellants.

APPENDIX C.

**Request for Publication of Unpublished Opinion.
(Rule 978, California Rules of Court).**

Appellate Department of the Superior Court, State of California, County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Jewell Productions, Inc., aka: Eros & James L. Scott, Defendants and Appellants. No. CR A 19703.

Pursuant to Rule 978, California Rules of Court, plaintiff, People of the State of California, requests that the opinion in the instant appeal filed by this Court on November 22, 1982, be certified for publication.

This request is predicated on two grounds. First, no published opinion has ever addressed the issue of whether or not the definition of "obscene matter" in Penal Code 311(a) pertains to advertisements prosecuted pursuant to California Penal Code Section 311.5. Additionally, this particular legal issue is one of continuing public interest as law enforcement agencies investigate numerous similar type cases and the rule of law of this case has not previously been established. (Rule 976, California Rules of Court).

Respectfully submitted,

IRA REINER, City Attorney

By /s/ Donna B. Weisz

DONNA B. WEISZ

Deputy City Attorney

APPENDIX D.

**Order Denying Rehearing and Denying
Certification and Publication.**

Appellate Department of the Superior Court, State of California, County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Jewell Productions Inc. aka EROS; James L. Scott, Defendant and Appellant.

Superior Court No. CR A 19703. Municipal Court of the Los Angeles Judicial District, No. 31156391.

Filed: December 9, 1982.

THE COURT*

The petition of defendant for a rehearing after judgment of this court on appeal or, in the alternative, certification of cause to the Court of Appeal in the above-entitled case, having been filed and having been duly considered,

Said petition is hereby denied.

The petition of plaintiff for publication of the opinion and judgment in the above-entitled case having been filed and having been duly considered,

Said petition is hereby denied.

/s/ Foster

*Before Foster, Acting P.J.,

/s/ Jones

Jones, J.,

/s/ Rothman

and Rothman, J.

APPENDIX E.

Misdemeanor Complaint.

In the Municipal Court of Los Angeles Judicial District,
County of Los Angeles, State of California.

The People of the State of California, Plaintiff, vs. Jewell
Productions, Incorporated, aka EROS and James L. Scott,
Bkg. No., Defendant(s). 31156391.

Filed, CLARK K. SAITO, Clerk.

By, Deputy Clerk.

Issued by BURT PINES, City Attorney. By /s/ Donna
B. Weisz, Deputy City Attorney DONNA B. WEISZ.

Comes now the undersigned and states that he is informed
and believes, and upon such information and belief declares:
That on or about April 7, 1980, at and in the City of Los
Angeles, in the County of Los Angeles, State of California,
a misdemeanor, to-wit; violation of Section 311.5 of the
Penal Code of the State of California was committed by
Jewell Productions Incorporated, aka EROS and James L.
Scott (whose true name to affiant is unknown), who at the
time and place last aforesaid, did wilfully and unlawfully
write, create, and solicit the publication and distribution of
advertising and other promotional material, and did promote
the sale, distribution, and exhibition of matter represented
and held out by him to be obscene.

All of which is contrary to the law and against the peace
and dignity of the People of the State of California. De-
clarant and complainant therefore prays that a warrant may
be issued for the arrest of said defendant(s) and that they
may be dealt with according to law.

Attached hereto and incorporated herein by reference as
though fully set forth are written statements and reports,

consisting of 4 pages, which constitute the basis upon which I make the within allegations.

A Declaration in Support of the Issuance of Such Warrant is Submitted.

Executed at Los Angeles, California, on

I declare under penalty of perjury that the foregoing is true and correct.

/s/ R.E. Peters

Declarant and Complainant

R.E. PETERS 13862

V.A. ARR. 6/9/80, 8:30 a.m.; Division 82

Witnesses:

APPENDIX F.

I. Demurrer to Complaint.

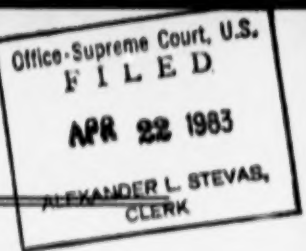
COMES NOW the above-named defendants who demur to the complaint herein pursuant to the provisions of §1004 of the Penal Code of the State of California on the grounds that:

1. The facts stated do not constitute a public offense.
2. The items which are the gravamen of the complaint were seized under a search warrant issued in violation of the Fourth Amendment; also said search warrant was issued without probable cause.
3. The court has no jurisdiction over the offense charged in the complaint.
4. Section 311.5 of the Penal Code of the State of California is unconstitutional.

DATED: July 30, 1980.

/s/ Burton C. Jacobson,
BURTON C. JACOBSON,
Attorney for Defendants
Jewell Productions, Inc. aka
EROS and James L. Scott.

No. 82-1311



**IN THE
SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1982

**JEWELL PRODUCTIONS, INC.,
aka EROS; JAMES L. SCOTT,**

Petitioner,

vs.

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Respondent.

**BRIEF OF RESPONDENT IN
OPPOSITION TO GRANTING OF
WRIT OF CERTIORARI**

IRA REINER

**City Attorney of Los Angeles
CHERYL J. WARD, Chief Assistant
Criminal Branch**

DONNA B. WEISZ

**Deputy City Attorney
Room 1600 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-6357**

Attorneys for Respondent

QUESTION PRESENTED

Whether petitioner's conviction for violating California Penal Code §311.5 (advertising for sale matter held out to be obscene) was obtained in violation of the First and Fourteenth Amendments of the United States Constitution where said statute was construed and applied to permit such conviction in the absence of:

a) proof that the matter so advertised was actually obscene; and

b) proof that each and every item of matter advertised in said advertisement was promoted and held out to be obscene.

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No. 82-1311

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JEWELL PRODUCTIONS, INC.,
aka EROS; JAMES L. SCOTT,

Petitioner,

vs.

PEOPLE OF THE STATE OF
CALIFORNIA

Respondents.

BRIEF OF RESPONDENT IN
OPPOSITION TO GRANTING OF
WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State
of California, respectfully pray that a
Writ of Certiorari to review the
judgment of the Appellate Department of
the Superior Court of the State of
California, entered against Petitioner

in the above-entitled case on November 22, 1982, not issue.

OPINIONS BELOW

No written opinions were rendered by the Municipal Court of the Los Angeles Judicial District. The defendants demurrer was orally overruled on August 22, 1980. The jury's verdict of guilty was affirmed by a written decision of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles on November 22, 1982. This opinion appears in Appendix A of Petitioners' Writ. The Order Denying Rehearing and Denying Certification and Publication was issued by the Appellate Department on December 9, 1982 and appears in Appendix D of Petitioners' Writ.

JURISDICTION

The judgment of the Appellate Department of the Superior Court for the County of Los Angeles was entered November 22, 1982. A copy of the judgment appears in Appendix A of Petitioners' Writ. A timely Petition for Rehearing or, in the alternative Certification of the cause to the Court of Appeal was denied by the said Appellate Department on December 9, 1982. A copy of said order appears in Appendix B of Petitioners' Writ.

As a result of the prior proceedings, the Appellate Department of the Superior Court of The State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code §1471; California

Rules of Court, Rules 24(a) and 28(b);
Smith v. California (1959) 361 U.S. 147,
148, fn. 2, 4 L.Ed.2d 1498, 77 S.Ct.
1103; Virginia Ry. Co. v. Mullins (1925)
271 U.S. 220, 222.

CONSTITUTIONAL AND
STATUTORY PROVISIONS
INVOLVED

California Penal Code §311.5
provides in pertinent part as follows:

"Every person who. . ., in any
manner promotes, the sale,
distribution, or exhibition of
matter represented or held out by
him to be obscene, is guilty of a
misdemeanor."

The First Amendment provides, in
part, as follows:

"Congress shall make no law
. . . abridging the freedom of

speech, or of the press. . . ."

The Fourteenth Amendment provides, in part, as follows:

" . . . No state shall . . .
deprive any person of life,
liberty, or property, without due
process of law. . . ."

STATEMENT OF THE CASE

On April 7, 1980, Los Angeles police Detective Robert Peters assigned to the Administrative Vice Division received in the mail an unsolicited advertising brochure from "Eros Discount" depicting sex acts between animals and human adults, for example "Big Horse and Girl", and between human adults and children, for example "Preteen Baby Movies" and "Baby and Dad Sex". Through surveillance, Detective Peters traced the brochure to

petitioners Jewell Productions Inc. and James L. Scott.

On April 21, 1980, Detective Peters went to a Judge of the Municipal Court of the Los Angeles Judicial District to secure a search warrant. Detective Peters prepared an 11 page affidavit in support of a search warrant which he submitted to the Honorable Clarence E. Stromwall, Judge of the Municipal Court of the Los Angeles Judicial District. After reviewing the affidavit, Judge Stromwall issued a search warrant. The warrant was served and a search was conducted under the supervision of Detective Peters.

During the search, none of the materials advertised in the brochure were found.

On May 22, 1980, the City Attorney

of the City of Los Angeles filed a complaint against Jewell Productions, Incorporated, aka EROS, and James L. Scott charging them with having committed a violation of Penal Code §311.5 (advertising matter represented or held out to be obscene). A copy of the complaint is included as Appendix E in Petitioners' Writ.

On July 31, 1980, Defendants filed a demurrer to the complaint (attached as Appendix F to Petitioners' Writ) and noticed a motion to traverse the Search Warrant and a motion for suppression of the evidence (P.C. §1538.5).

On August 22, 1980, after both sides had submitted written points and authorities and argument was heard, the Honorable Michael Berg, Judge Presiding, overruled the demurrer and denied the

motions to traverse the Search Warrant and the motion for suppression of the evidence.

Defendants, through counsel, were arraigned and plead not guilty. A trial date of October 16, 1980 was set. After several continuances, a jury trial commenced on January 12, 1982 in Division 26 of the Los Angeles Municipal Court, the Honorable James S. Yip, Judge presiding.

On January 18, 1982, the court ruled, in limine, that the actual content of the material advertised was irrelevant to the charge. The trial court also instructed the jury, in effect, that it was not necessary that it agree that each and every item advertised was held out to be obscene (also advertized were dildos, blow-up

dolls, and a variety of other sexually oriented merchandise), so long as all jurors agreed, if they so found, on what matter they found to have been held out to be obscene.

Plaintiffs were found guilty. The court placed them on probation and imposed a fine.

ARGUMENT

NO SUBSTANTIAL FEDERAL

QUESTION IS PRESENTED

In the two and one half decades since Roth v. United States (1957) 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1103, this Court has decided numerous obscenity cases; nothing in the Petition for Certiorari indicates that another is necessary.

Petitioner's brief raises mundane issues about trial court evidentiary

rulings, yet, because the work "obscenity" is involved, their knee-jerk reaction is to invoke the whole panoply of 1st and 14th Amendment rights.

Their contentions are two: the trial court erred in instructing that the advertising brochure need not be considered "as a whole", and it ruled that the actual content of the matter advertised was not germane to the question of whether they advertised it to be obscene.

Petitioner's arguments ignore the fact that their brochure was a catalog -- in addition to the films they advertised, which Respondents alleged were held out to be obscene, the brochure advertised sexual applicances, "rubber goods", comic books, still pictures, etc. The "taken as a whole"

portion of the obscenity test is necessary to a determination of the obscene nature of the matter, but it is irrelevant to a decision whether someone has held out matter, whether obscene or not, to be obscene. Similarly, whether the matter so held out is actually obscene is irrelevant to the question of whether matter has been held out as obscene.

In this case, Petitioners advertised to sell films depicting bestiality ("Animals for Sex films, Reg. 8mm or Super 8mm B & W, four complete films of bestiality at its best: 1. Beast Suck-Off, 2. Large Cock Dog, 3. Big Horse and Girl, and 4. The Stud and I") and sex with children ("Preteen Baby Movies. Four Complete Films of Preteen Sex! These films are the hardest films

to purchase for the obvious reasons! They show little boys and girls getting it on!! Naturally, we can't show a picture of what these kids are doing on this brochure. Reg. 8mm or Super 8mm B & W 1. Baby and Dad Sex; 2. Let's Play With It; 3. Teen Suck Off, and 4. First Time I Came"). Their manner of advertising constituted pandering.

"The deliberate representation of Petitioner's publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content... .Where the purveyor's sole emphasis is on the sexually provocative aspects of his

publications, that fact may be decisive in the determination of obscenity".

Ginsberg v. United States

(1965) 383 U.S. 463, 470, 16

L.Ed.2d 31, 38, 86 S.Ct. 942.

Petitioners clearly commercially exploited the erotica advertised solely for the sake of its prurient appeal.

Penal Code §311.5 as construed and applied in this case is clearly consistent with Federal Law. Grimm v. United States (1894) 156 U.S. 604, 15 S.Ct. 470, 39 L.Ed. 550 and its progeny show that the "federal question" Petitioners attempt to raise was settled by the federal courts years ago.

United States Revised Statute §3893 prohibited the use of the mails for transmitting information regarding the

place where obscene, lewd or lascivious pictures could be obtained. The court in Grimm, supra, upheld the statute's validity despite the fact that the letter in question was not in itself obscene, lewd or lascivious and the pictures, papers and prints were merely alleged to be obscene,

United States v. Hornick (3rd Cir. 1956) 229 F.2d 120 upheld Title 18 U.S.C. §1461 (mailing advertisements giving information as to where obscene pictures could be obtained) and followed Grimm v. United States, supra, in holding that the announcement itself is not required on its face to promise obscene material if that is its purpose. The court further held:

"We do not think it is
necessary that representations

made in these advertisements be true. The statute says "advertisement * * * giving information." The statute does not say that the advertisement must be true or that the information must be accurate. What is forbidden is advertising this kind of stuff by means of the United States mails. We think that the offense of using the mails to give information for obtaining obscene matter is committed even though what is sent in response to the advertisement to the gullible purchasers is as innocent as a Currier and Ives print or a Turner landscape."

United States v. Hornick,
supra, at 122

In United States v. Perkins (6th Cir. 1961) 268 Fed. 2d 150, 151, following the precedent established in Grimm, supra, and Hornick, supra, the court held that the actual obscenity of the material advertised was irrelevant.

California has clearly followed federal law.

The California Court of Appeal in Kirby v. Municipal Court, (1965) 237 Cal.App.2d 335, 349 (Petition for hearing by the California Supreme Court denied, November 24, 1965), relied on Grimm v. United States, supra, when it held that "the validity of statutes like §311.5 is not a new question, nor should its answer be in doubt".

The Kirby court also held:

"Clearly, advertising of matter which is found or conceded to be obscene is not within the protective area of free speech or press (established by Alberts v. United States, supra, 354 U.S. 476); such advertising is equally as subversive of good morals as is the sale of the article thus held out for sale, and the decisions in Grimm v. United States, supra, 156 U.S. 604; United States v. Hornick, supra, 229 F.2d 120 specifically hold that an advertisement fitting into the description of our \$311.5 - "represented or held out to be obscene" - is equally beyond

the protection of free speech as is a sale of the subject literature regardless of whether that literature is itself barred from sale because pornographic".

(Kirby v. Municipal Court,
supra, p. 348)

The California Courts have also specifically dealt with one of the issues raised by Petitioners in People v. Tierney (1967) 253 Cal.App.2d 1. Despite the fact that all of the materials advertised were, according to the court, described as "innocuous", the court reversed the trial court's dismissal of an indictment against the defendants for conspiracy to violate §311.5 based on their mailing of a brochure offering for sale films, still

photographs, playing cards, and comic books. The Court found that:

"All of the respondents knew of the contents of their brochure, since all participated in its preparation or distribution, or both. It offers, or at the very least appears to offer, material of an obscene nature. Its preparation was carefully devised, and its calculated purpose was to lead the reader to believe that some perverted or sexual material would be supplied to those who placed their orders and sent in their money. But as we have said, the material supplied was innocuous."

Id. at 4-5

There is no significant difference between Kirby, supra, Tierney, supra, and Petitioners' case. The trial court here followed precedent established by the United States Supreme Court, the Federal courts and the courts of the State of California. Petitioners concede that laws making it illegal to distribute obscene material are constitutional. Laws which prohibit advertising matter to be obscene do not operate to infringe upon either the First or Fourteenth Amendments.

CONCLUSION

For the foregoing reasons respondents submit that the arguments raised in the Petition for Writ of

Certiorari in this matter are simply not meritorious. The Petition should be denied.

Dated: April 19, 1983.

Respectfully submitted,

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